90-1602

No. ——

Supreme Court, U.S.
FILED
APR 17 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TENNESSEE GAS PIPELINE CO.,
Petitioner,

v.

ANDERMAN/SMITH OPERATING CO.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
VINCENT F. EWELL, JR.
JOHN E. LEA
TENNESSEE GAS PIPELINE COMPANY
1010 Milam Street
P.O. Box 2511
Houston, Texas 77252
(713) 757-1246

ERNEST G. TAYLOR, JR.
KATHRYN H. HESTER
W. WHITAKER RAYNER
WATKINS LUDLAM & STENNIS
633 North State Street
P.O. Box 427
Jackson, Mississippi 39205
(601) 949-4900

DANIEL JOSEPH, P.C.*
COLLEEN M. COYLE
MARGARET J. BABB
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

63

QUESTIONS PRESENTED

1. May a court of appeals confirm an award made by a panel of arbitrators, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, where the arbitrators have refused to "concur" in and enforce the contract term at issue and have replaced that term with other provisions written by the arbitrators themselves?

2. May the court of appeals rely, as the ground for upholding the arbitrators' award, on the court's own interpretation of the contract including an interpretation of a portion of the contract that the arbitrators had not even mentioned?

3. Did the court of appeals err in holding

   (a) that a reviewing court must ignore the opinion and reasoning provided by the arbitrators in explanation of their decision even if that opinion shows that the decision exceeded the arbitrators' powers, and

   (b) that, regardless of whether the arbitrators had based their decision on an improper ground, the court would confirm their result if, after the court's own examination of the contract, it appeared to the court that the result reached by the arbitrators was "rationally inferable" from the contract?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are all listed in the caption. Tennessee Gas Pipeline Company's parent company is Tenneco, Inc. Its non-wholly owned subsidiaries are as follows:

Akulu Chemicals Coast (PTY) Limited (South Africa)
Akulu Chemicals (PTY) Ltd. (South Africa)
Akulu Marchon (PTY) Ltd. (South Africa)
Albright, Morarji and Pandit Limited (India)
Albright & Wilson Asia Taiwan Limited (Taiwan)
Albright & Wilson Australia Limited (Australia)
Albright & Wilson New Zealand Limited (New Zealand)
Alcan Ecko Limited (United Kingdom)
A/S Haustrup-Ekco Aluminium-Emballage (Denmark)
Case Poclain S.A. (France)
Case Poclain GmbH & Co. (Germany)
Case Vibromex GmbH Und Co. (Germany)
Consolidated Diesel Company (North Carolina Partnership)
Ekco S.A.R.L. (France)
Hay & Forage Industries (Kansas Partnership)
HT Gathering Company (Texas)
Intertractor Viehmann GMBH & Co. (Germany)
J.I. Case SpA (Italy)
Kern River Gas Supply Corporation (Delaware)
Kern River Service Corporation (Delaware)
Monroe Auto Pecas S.A. (Brazil)
Oasis Pipeline Company (Delaware)
Omni-Pac GmbH (Germany)
Omni-Pac S.A.R.L. (France)
P.P.M. Guindastes Hidraulicos S.A. (Brazil)
Polyphosphates Inc. (Philippines)
Poclain do Brasil S.A. (Brazil)

S.A. Paper Chemicals (Pty) Limited (South Africa)
Sara Gretes Cafeteria AB (Sweden)
Skogstre A/S (Norway)
Specialty Phosphates (Malaysia) SDN BHD (Malaysia)
Sperry Marine Limited (United Kingdom)
TENN-USS Chemicals Finance Corporation (Delaware)
Tenneco Automotive Foreign Sales Corporation Limited (Jamaica)
Tenneco Canada, Inc.
Tenneco Deutschland Beteiligungs GmbH (Germany)
Tenneco Oil Company of Nigeria Unlimited (Nigeria)
Tenngasco Gas Gathering Company (Delaware-in dissolution)
Toyo Ecko Company, Ltd. (Toyo Ekco Kubushiki, Kaisha) (Japan)
Vibromax France S.A.R.L. (France)
Vibromax SCI (France)
Walker Deutschland GmbH (Germany)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Terms of the Contract	4
B. The Dispute Between the Parties	5
C. The Arbitration Award	6
D. The Fifth Circuit Opinion	7
REASONS WHY THE WRIT SHOULD BE GRANTED	9
I. BY APPROVING AN ARBITRATORS' DECISION THAT REWROTE CONTRACT PROVISIONS, THE FIFTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S OPINION IN *STEELWORKERS*	9
II. THE FIFTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF ANOTHER CIRCUIT AND THIS COURT IN HOLDING THAT A REVIEWING COURT MUST BOTH IGNORE THE WRITTEN OPINION AND REASONING OF THE ARBITRATORS AND INTERPRET THE CONTRACT ITSELF TO SEEK SUPPORT FOR THE ARBITRATORS' RESULT	12

TABLE OF CONTENTS—Continued

Page

A. The Holding That a Court Does Not Review "the Language Used by, or the Reasoning of, the Arbitrators" Is in Direct Conflict With Decisions of the Seventh Circuit 13

B. The Fifth Circuit's Decision To Interpret a Contract Clause Itself (a Clause That the Arbitrators Had Not Interpreted) Conflicts With Decisions of This Court and Other Courts of Appeals 15

C. The Fifth Circuit's Decision Rests Upon an Interpretation of the Purpose of the Federal Arbitration Act That Directly Conflicts With That Given in a Holding of This Court 16

III. THE FIFTH CIRCUIT'S DECISION WILL HAVE SERIOUS ADVERSE EFFECTS UPON THE USE OF ARBITRATION BY CONTRACTING PARTIES 17

A. Arbitration Less Attractive 17

B. Judicial Review More Complex and Costly 18

C. Arbitrators Will Not Explain Decisions 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

American National Petroleum Co. v. Transcontinental Gas Pipeline Corp., 798 S.W.2d 274 (Tex. 1990) 3
Anderman/Smith Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990) 1, 18
Associated Gas Distributors v. F.E.R.C., 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 3
AT&T Technologies v. Communications Workers of America, 475 U.S. 643 (1986) 16, 18
Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195 (9th Cir. 1982) 9, 11
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 17
Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) 12
Jenkins v. Prudential-Bache Securities, Inc., 847 F.2d 631 (10th Cir. 1988) 9
Kennedy & Mitchell v. Anadarko Production Co., 754 P.2d 803 (Kan. 1988) 3
Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977) 11
Pacific Motor Trucking Co. v. Automotive Machinists' Union, 702 F.2d 176 (9th Cir. 1983) 10
Randall v. Lodge No. 176, IAM, 648 F.2d 462 (7th Cir. 1981) 13, 14
Sears Roebuck & Co. v. Teamsters Local Union No. 243, 507 F. Supp. 658 (E.D. Mich. 1981), *aff'd*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) 11
Shearson/American Express v. McMahon, 482 U.S. 220 (1987) 17
Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409 (1986) 3
United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 16
United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 9, 10, 13
Young Radiator Co. v. International Union, United Auto Workers, 734 F.2d 321 (7th Cir. 1984) 14

STATUTES

Federal Arbitration Act
9 U.S.C. § 2 2
9 U.S.C. § 9-10 ..... 2, 13
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332(a) 2, 7

OTHER MATERIALS

A. Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482 (1959) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

TENNESSEE GAS PIPELINE CO.,
Petitioner,

v.

ANDERMAN/SMITH OPERATING CO.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tennessee Gas Pipeline Co. prays that a Writ of Certiorari be issued to review the opinion and order of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on December 13, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 918 F.2d 1215, and is reprinted in Appendix A, 1a-10a. The order of the Fifth Circuit denying Tennessee's petition for rehearing, issued on January 17, 1991, is reprinted in Appendix D, 28a-29a. The unreported opinion and order of the United States District Court for the Southern District of Mississippi, issued May 30, 1990, is reprinted in Appendix B, 11a-26a and Appendix C, 27a. The Arbitration Award, issued August 22, 1989, is reprinted in Appendix E, 30a-32a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendition of judgment. The decision for which review is sought was entered December 13, 1990 (Pet. App. A, 1a-10a). A petition for rehearing was timely filed, and rehearing was denied on January 17, 1991 (Pet. App. D, 28a-29a).

STATUTORY PROVISIONS INVOLVED

This Petition involves Sections 2, 9, and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 2, 9-10. These sections are reprinted in Appendix F, 33a-34a.

STATEMENT OF THE CASE

On April 1, 1982, Tennessee Gas Pipeline Company ("Tennessee") and Anderman/Smith Operating Company ("Anderman") executed a ten year Gas Purchase and Sales Agreement ("contract") in which Tennessee agreed to purchase and Anderman agreed to sell natural gas from wells located in Alabama and Mississippi. Pet. App. at 11a, 13a. Tennessee resells the gas to local distribution companies (which in turn sell it to individual homes and businesses) and industrial users in its end use markets.[1]

The contract was negotiated and executed against the background of the industry's tumultuous history, in which a period of stable supply was followed by a time (approximately 1977 through 1981) of acute shortages and sharply increasing prices, which put sellers in a position to insist on favorable contract terms. Specifically, sellers were able to demand "take or pay" clauses, which require pipelines either to purchase a certain percentage

[1] By Amendment the parties extended the term of the Agreement on February 19, 1987, to last through April 30, 1994.

of the gas or to make payments even if they did not have sufficient demand to take delivery. That period was then rapidly followed by a continuing period (1982 and following years) of an oversupply of gas and declining prices, which allowed pipelines to bargain for contract terms that balanced the rights of the producer and the pipeline.[2]

With fluctuating and unpredictable prices, demand, and supply, producers of gas wished to continue having "take or pay" clauses so that they could avoid fluctuations in cash flow, but pipelines became able to insist upon market sensitive pricing terms permitting the parties to adjust the price for gas periodically to reflect current market conditions.[3]

The most common mechanism for the pipeline to achieve this market price sensitivity in long-term contracts is called a "market-out" clause. A typical market-out clause allows the pipeline unilaterally to reduce the price it is willing to pay the producer for gas when the pipeline determines that the current price is not a competitive one. However, the producer retains the right to solicit offers at better prices from third parties and, if the producer locates a buyer that is willing to pay a higher price, the pipeline has the option of raising its offer to match the other buyer's or releasing the producer from the contract.[4] Thus, the pipeline has the assurance that it will not be required to purchase gas at a price that is not competitive in its markets and the producer

---

[2] *See, e.g., Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, 995 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[3] *Cf. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 412 (1986).

[4] *See American National Petroleum Company v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274 (Tex. 1990); *Kennedy & Mitchell v. Anadarko Production Co.*, 754 P.2d 803, 806 (Kan. 1988).

is assured of a mechanism to receive the highest price available for its gas in the marketplace.

A. The Terms of the Contract

The contract in the instant case, as amended on January 1, 1985 and February 19, 1987, requires Tennessee to take or pay for 60 percent of all of the gas that Anderman can produce in any given contract year. It also provides that Tennessee would pay Anderman a price of $3.845 per MMBtu (i.e., a million British thermal units, a common measure of heating value) between January 1, 1985 and December 31, 1985, and that after that period, either party had a right to adjust the price based upon market conditions. Pet. App. at 13a, 32a. Anderman, as seller, may obtain a higher price for its gas in a market where prices are increasing by invoking the price redetermination provision set forth in Paragraph 10.2.2 of the Agreement. Pet. App. at 14a n.3. Tennessee, as buyer, has the right to adjust the price in a declining market in accordance with the following market-out provision:

> In the event the price payable by Buyer to Seller for gas pursuant to this section 10., together with any additional payments, allowances or reimbursements payable under this Agreement and applicable to such gas, *in Buyer's sole judgment*, results or will result in such gas being uncompetitive in Buyer's end-use markets, Buyer shall have the right to nominate a new price and price computation method for such gas which, *in Buyer's sole judgment*, will result in such gas being competitive in Buyer's said end-use markets. . . .
>
> Buyer shall give Seller written notice ("Buyer's Notice") setting forth the cause and details of Buyer's nomination of a new price and price computation method to be effective ninety (90) days after the date of Buyer's Notice. During the first sixty (60) days following the date of Buyer's Notice, Seller

> may solicit bona fide offers from other purchasers for the gas to be delivered by Seller as to which Buyer has nominated a new price hereunder. Within seventy-five (75) days after the date of Buyer's Notice, Seller shall submit in writing to Buyer a notice ("Seller's Notice") setting out in reasonable detail the terms of any offer for such gas which is acceptable to Seller. Buyer shall have fifteen (15) days after the date of Seller's Notice in which to elect in writing to continue purchasing in accordance with the terms of the bona fide offer set out in Seller's Notice or to furnish a written release of such gas. Should Seller fail to issue a Seller's Notice in response to any Buyer's Notice, the price and price computation method specified in Buyer's Notice shall become effective and payable by Buyer for deliveries of gas affected thereby after ninety (90) days following the date of Buyer's Notice. . . .

Pet. App. at 3a, 14a n.3 (emphasis added).

Thus, Tennessee bargained for and obtained the unilateral right to market out when, in its sole judgment, it determines that the price it is paying to Anderman renders its gas uncompetitive in Tennessee's end use market; Anderman bargained for and received the assurance that it could receive the highest market price available for its gas if it thought that Tennessee's nominated price was below market for the gas.

B. The Dispute Between the Parties

In 1986, when the demand for natural gas fell and prices declined, the parties agreed to suspend performance under the contract through April 1, 1989. Pet. App. at 13a. When the suspension period ended, Tennessee exercised its market-out rights under the contract and nominated a new price of $1.60 per MMBtu. Anderman refused Tennessee's offer and objected to Tennessee's right to market out. Pet. App. at 13a. Anderman did not seek an alternative buyer for its gas, but instead

argued that Tennessee was not entitled to market out under Paragraph 10.4 of the contract unless Anderman had first sought a redetermination of the price under Paragraph 10.2.2. Anderman filed suit in the District Court seeking a declaration of rights. Pet. App. at 2a, 16a.

Upon receiving Anderman's complaint, Tennessee invoked the arbitration clause of the contract, which provides in pertinent part, "[a]ny controversy arising between the parties with respect to any provision of this Agreement and not resolved by agreement shall be determined by a board of arbitration upon notice of submission given either by Buyer or Seller . . . ." *See* Pet. App. at 2a, 15a. Pursuant to this provision, Tennessee and Anderman proceeded to arbitration.

C. The Arbitration Award

The Arbitration Panel held as follows, in pertinent part:

> III.
>
> The Panel duly noted the "market out" and "price redetermination" rights available to both parties under the contract. *We are unable to concur in that portion of Section 10.4 of the contract undertaking to allow Buyer "in Buyer's sole judgment . . . to nominate a new price and price computation method which . . . will result in such gas being competitive in Buyer's said end use markets." We find that portion of Section 10.4 over reaching and unenforceable.* While the Panel recognizes the importance of Buyer retaining its ability to compete in its end use markets as constituting an acceptable test of any currently effective or proposed contract price, the Panel concluded that Buyer should be required to establish the afore-described economic precondition by a preponderence [sic] of the evidence in any later request to exercise its "market out" right.
>
> * * * *

> . . . the Panel undertook by this award to provide a fair price to the Seller, while retaining Buyer's ability to compete, in Buyer's end use markets. . . .

Pet. App. at 31a (emphasis added). The arbitration award thus expressly rejected the specific terms of the market-out provision for which the parties negotiated (and in exchange for which Tennessee agreed to take or pay for 60 percent of Anderman's gas). Under the arbitrators' view, Tennessee should not be able to decide in its "sole judgment" whether to lower its price to remain competitive, as the contract explicitly provided. Rather, the arbitrators concluded that for the remaining term of the contract Tennessee should be required to prove its need to market out to the arbitrators by a preponderance of the evidence in an arbitration proceeding at any time in the future in which it wished to market out.

Anderman sought confirmation of this award in the United States District Court for the Southern District of Mississippi, which had jurisdiction based upon diversity of citizenship, 28 U.S.C. § 1332(a). Pet. App. at 11a. By order dated May 30, 1990, the District Court (without oral argument) enforced the Award. Pet. App. at 11a-26a. Tennessee appealed the district court's order to the United States Court of Appeals for the Fifth Circuit.

D. The Fifth Circuit Opinion

The Fifth Circuit affirmed the District Court's enforcement of the arbitration award without oral argument. Pet. App. at 1a-10a. The court of appeals recognized both that the parties had agreed to contractual provisions allowing either to adjust the price of Anderman's gas in response to market fluctuations and that the market-out provision allowed Tennessee to adjust the price when, in its sole judgment, it determined that Anderman's price was too high. Pet. App. at 3a. Moreover, the court recognized that Anderman did not have

to accept Tennessee's nominated price if it thought that price was too low, but instead could solicit a better price for its gas from third parties and require Tennessee either to match any such offer or to release the gas. Pet. App. at 3a.

Nonetheless the Fifth Circuit sustained the result reached by the arbitrators. It first relied upon a portion of the contract that the arbitrators had not mentioned in their decision.[5] The court of appeals held that the result reached by the arbitrators was "rationally inferable" from the provision, which required Tennessee to notify Anderman of the terms of any market-out nomination.

Responding to Tennessee's argument that the arbitrators had explicitly "refused to concur" in, and had written out of the contract, Tennessee's right to set a market-out price "in its sole discretion," the Fifth Circuit first held that the arbitrators had permissibly interpreted this language away. Pet. App. at 7a, n.3. The court then held that in any event a reviewing court "does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws its essence from the contract." Pet. App. at 8a, n.3. Rather, the Fifth Circuit held, the reviewing court itself, ignoring the arbitrators' explanations, determines whether the result reached by the arbitrators, "however arrived at, is rationally inferable from the contract." *Id.* Thus the arbitrators' statement that they were refusing to concur in the contract was irrelevant. The Fifth Circuit concluded that the details of the requirements set by the arbitrators were a permissible "remedy." Pet. App. at 8a ff.

[5] The provision relied on by the Fifth Circuit reads "[Tennessee] shall give [Anderman] written notice . . . setting forth the cause and details of [Tennessee's] nomination of a new price and price computation method to be effective ninety (90) days after the date of [the] notice. During the first sixty (60) days following the date of [the notice], [Anderman] may solicit bona fide offers from other purchasers for the gas. . . ." Pet. App. at 3a, 7a.

Tennessee's petition for rehearing and suggestion of rehearing en banc were denied. Pet. App. at 28a-29a.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Fifth Circuit's decision seriously conflicts with decisions of this Court and other federal courts of appeals setting the proper role of a court in reviewing decisions of arbitrators under the Federal Arbitration Act. Moreover, the lower court's decision makes arbitration far less desirable as an alternative to litigation for resolution of disputes. The Fifth Circuit decision improperly expands the role of reviewing courts, discourages arbitrators from explaining their decisions, deprives contracting parties of their bargained-for right to have arbitrators' enforce the contract pursuant to its written terms, and sets a precedent that will inevitably increase the frequency, time, complexity, and cost of judicial review of arbitrators' decisions.

I. BY APPROVING AN ARBITRATORS' DECISION THAT REWROTE CONTRACT PROVISIONS, THE FIFTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S OPINION IN *STEELWORKERS*.

In confirming the award of the panel of arbitrators, the Fifth Circuit departed from a fundamental doctrine of judicial review of arbitration under the Federal Arbitration Act—that the arbitrators were "confined to interpretation and application" of the contract between the parties; they did not "sit to dispense [their] own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).[6] When arbitrators have departed from the text

[6] The courts of appeals hold without exception that this standard, developed in a case involving the labor laws, applies in arbitrations in non-labor cases under the Federal Arbitration Act. *E.g., Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197 (9th Cir. 1982).

of the contract, it is the obligation of a reviewing court to vacate their decision. *Id.*

There is no question that the arbitrators so departed here. The contract gave Tennessee full discretion "in [its] sole judgment" to lower the price it was willing to pay for Anderman's gas to a level permitting Tennessee "to compete in its end use markets." Anderman's contract remedy, if it thought the price set by Tennessee was too low, was to sell to anyone else who offered more for the gas. Pet. App. at 3a. The arbitrators eliminated Tennessee's right to reset the price in its discretion and provided instead that for the entire remaining contract term Tennessee must convince the arbitrators of the necessity of the step before it can effectuate any price change to meet competition.

Indeed, the arbitrators openly recognized that they were deleting what the parties had agreed to and adding the arbitrators' own notion of what was fair. They said that they were "unable to concur" in the language allowing Tennessee to use its sole judgment in setting prices to meet competition, and that they found those provisions "unenforceable."[7] The arbitrators "recognize[d] the im-

---

[7] The Fifth Circuit mischaracterized the arbitrators' holding by stating that "the arbitrators decided that the interpretation of the contract offered by Tennessee would render the contract 'over reaching and unenforceable.'" Pet. App. at 7a.

The arbitrators applied the characterization "over reaching and unenforceable" to a "portion of Section 10.4 [of the contract]," Pet. App. at 7a, not to Tennessee's argument. This further shows (and the Fifth Circuit's mischaracterization obscures) that the arbitrators simply found the contract not to their liking and rewrote it. Nor did (as the Fifth Circuit suggested) the arbitrators use the term "unconscionable."

In any event, other courts of appeals have held that arbitrators' labellings of the effect of contract provisions as "unreasonable and unconscionable" or "unfair" cannot support an arbitrator's decision that violates contract terms. *Pacific Motor Trucking Co. v. Automotive Machinists' Union*, 702 F.2d 176, 177 (9th Cir. 1983) (arbitrator found application of provision "unconscionable and

portance of [Tennessee] retaining its ability to compete in its end use markets . . . ," but they "concluded that [Tennessee] *should be required* to establish the aforedescribed economic precondition by a preponderence [sic] of the evidence" to the arbitrators themselves before being permitted to implement it. Again in terms of frank rewriting of the contract, the arbitrators summed up by saying, "[T]he [arbitrators] undertook by this award to provide a fair price to [Anderman], while retaining [Tennessee's] ability to compete in [its] end use markets." (Pet. App. at 31a; emphasis added.)

The Fifth Circuit's decision upholding the arbitrators' rewriting of the contract directly conflicts with the holding of this Court in *Steelworkers* and of course with the many holdings of other courts of appeals that follow that decision. *E.g., Coast Trading Co., Inc. v. Pacific Molasses Co.*, 681 F.2d 1195, 1197-98 (9th Cir. 1982); *Mistletoe Express Service v. Expressmen's Union*, 566 F.2d 692, 693, 695 (10th Cir. 1977). The Fifth Circuit did seek to characterize the arbitrators' decision here as "precisely the sort of issue of contract interpretation that an arbitration scheme is designed to resolve," and it said that all the arbitrators had done was "construe the scope of Tennessee's right more narrowly than Tennessee would construe it . . . ." Pet. App. at 7a, n.3. But calling this redrafting of the contract by the arbitrators an "interpretation" merely masks an impermissible holding in an inaccurate label. The court cannot "simply by making the right noises—noises of contract interpretation"

---

unfair"); *Sears Roebuck & Co. v. Teamsters Local Union No. 243*, 507 F. Supp. 658 (E.D. Mich. 1981), *aff'd*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) (arbitrator disregarded provision found to be "unfair"). Nor did the arbitrators or reviewing court explain what could be "over reaching" (not to say "unconscionable") about a pricing provision that assures Anderman (in the Fifth Circuit's own words) that it is free to sell to others if it "receives better offers for its gas from another purchaser or purchasers" unless "Tennessee . . . match[es] those offers . . . ." Pet. App. at 3a.

(*Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 187 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986)) hide the fact that the arbitrators rewrote the contract's pricing provision.

II. THE FIFTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF ANOTHER CIRCUIT AND THIS COURT IN HOLDING THAT A REVIEWING COURT MUST IGNORE BOTH THE WRITTEN OPINION AND REASONING OF THE ARBITRATORS AND INTERPRET THE CONTRACT ITSELF TO SEEK SUPPORT FOR THE ARBITRATORS' RESULT.

Perhaps aware that it was on thin ice in referring to the arbitrators' decision as an "interpretation" of the contract language, the court of appeals provided a second ground for dealing with the arbitrators' admission that they rewrote the pricing provision of the contract.

The court of appeals held that what the arbitrators actually said in arriving at their decision was irrelevant. It held that a court "does not review the language used by, or the reasoning of, the arbitrators." Pet. App. at 8a, n.3. Rather, the court would "look only to the result reached [by the arbitrators] . . . *however arrived at* . . . ." *Id.* Thus, the Fifth Circuit held that it did not matter whether the ground relied upon by the arbitrators was valid or invalid. Rather, the court would perform its own legal analysis to assess whether the result was "rationally inferable" from the contract.

And that is just what the Fifth Circuit did: it read the contract itself, located a provision in Section 10.4 that the arbitrators had not relied on or even mentioned (and which Anderman had not even argued as support for the arbitrators' decision), and held that the arbitrators' decision was "rationally inferable" by the court from this language that the court had itself found. Pet. App. at 6a. *See* n.5, *supra*.

These holdings are utterly contrary to the body of law developed by this Court and by other federal courts of appeals on judicial review of the decision of arbitrators.

A. The Holding That a Court Does Not Review "the Language Used by, or the Reasoning of, the Arbitrations" Is in Direct Conflict With Decisions of the Seventh Circuit.

In *Randall v. Lodge No. 176, IAM*, 648 F.2d 462 (7th Cir. 1981), the Seventh Circuit held that it was unclear whether an arbitrator had based his decision on a valid or an invalid ground because of an ambiguity in the "text of his decision." 648 F.2d at 468. That court vacated the arbitrator's decision because of this ambiguity. The court did note that an arbitrator's decision need not be free from ambiguity, and that the arbitrator need not even state his reasons, citing *Steelworkers*, 363 U.S. at 598.

But, the Seventh Circuit continued, "once the reasons that are given [by the arbitrator] strongly imply that the arbitrator may have exceeded his or her authority under . . . the contract," then the reviewing court should vacate the arbitrator's decision and obtain a ruling from the arbitrator that would 'clarify the basis for the initial determination."[8] *Id.* The Seventh Circuit held that the matter should be explicitly ruled on by the arbitrator because

---

[8] Section 10(e) of the Act allows a court to remand to the arbitrators only where "the time within which the agreement required the [arbitration] award to be made had not expired . . . ." 9 U.S.C. § 10(e). *See United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 40-41 n.10 (1987). In the present case, since the contract requires the arbitrators to complete their task within 60 days, Pet. App. at 18a, that time has long since expired, and a reviewing court would have to vacate rather than remand. Because of the briefness of the 60-day period, however, a panel of arbitrators would be required to act quickly to correct errors made by the previous panel.

"[the court] cannot usurp the arbitrator's function to [interpret the contract]." *Randall*, 648 F.2d at 468.

To the same effect, in *Young Radiator Co. v. International Union, United Auto Workers*, 734 F.2d 321 (7th Cir. 1984), the Seventh Circuit vacated an arbitrator's award because the arbitrator's opinion revealed that he had ruled on the wrong issue. The court held that "the main issue . . . is the precise basis for the arbitrator's decision. We agree with the parties that our main task is to interpret the arbitrator's opinion, and we have examined that opinion closely." 734 F.2d at 324. Because that examination showed that the arbitrator had ruled on the wrong issue, the court reversed.

The Fifth Circuit's ruling in the present case is in direct, irreconcilable conflict with these decisions. The Seventh Circuit examined the arbitrators' opinion to determine whether the arbitrators had ruled impermissibly or ambiguously; the Fifth Circuit held that it was irrelevant whether the arbitrators' reasoning was valid or invalid. Moreover, to avoid the court's performing a task that the parties intended to be performed by arbitrators, the Seventh Circuit vacated to obtain a proper arbitrators' interpretation. The Fifth Circuit did the opposite: it held that the court itself would decide, by its own analysis of the contract, whether any basis existed which the court thought was "rationally inferable" from the contract.

Thus, the Fifth Circuit's decision is in conflict with *Randall* and *Young*, in which the Seventh Circuit held both that a court must examine the stated reasons of the arbitrator and that the court is not empowered itself to undertake to interpret the contract, but must leave that task to arbitrators.

In *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), this Court by strong implication held consistently with the Seventh Circuit and inconsistently with the

Fifth Circuit in the present case. In *Misco*, an arbitrator's opinion made a "cryptic[]" observation that left it unclear how he had interpreted an important contractual clause. This Court held (rejecting the contention of the respondent that the lower court's judgment could be sustained on this separate ground) that it would have been improper for the reviewing court to dispose of the case on that issue without first obtaining a definitive interpretation from the arbitrator. 484 U.S. at 40-42. The Fifth Circuit's rationale in the present case would compel the opposite result: the reviewing court should ignore the cryptic remark and the possibility that the arbitrator had grounded his decision improperly, and confirm the result reached by the arbitrator if the court thought that there was any ground that supported that result (but regardless of whether the arbitrator had relied on that ground).

B. The Fifth Circuit's Decision To Interpret a Contract Clause Itself (a Clause That the Arbitrators Had Not Interpreted) Conflicts With Decisions of This Court and Other Courts of Appeals.

In *United Paperworkers v. Misco*, this Court held that it "exceeds the authority" of a court reviewing an arbitrator's decision for the court itself to decide issues that the parties bargained to be decided by the arbitrator. 484 U.S. at 44-45. In this particular passage, this Court took a court of appeals to task for drawing a factual inference, but *Misco* also holds (as we noted above) that a reviewing court should not deal with legal issues that were within the arbitrator's province unless and until the arbitrator has provided a "definitive construction of the contract" with respect to such issues. 484 U.S. at 42-43.

Indeed, in *dicta*, this Court in *Misco* addressed a question very similar to that faced by the court of appeals in the present case. Discussing a situation in which an arbitrator's "procedural aberrations rise to the level of

affirmative misconduct" as a result of which the arbitrator does not consider the merits, this Court said (484 U.S. at 40 n.10):

> [A]s a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since the step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for . . . . Instead, the court should simply vacate the award . . . .

To the same effect, in *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 568 (1960), this Court insisted that "when the parties have agreed to submit all questions of contract interpretation to the arbitrator, . . . [t]he courts . . . have no business weighing the merits . . . or determining whether there is particular language in the written instrument which will support the claim." *See also AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986). The Fifth Circuit departed from these commands by interpreting the contract itself. *See* discussion at page 8, n.5 above.

C. The Fifth Circuit's Decision Rests Upon an Interpretation of the Purpose of the Federal Arbitration Act That Directly Conflicts With That Given in a Holding of This Court.

The Fifth Circuit sought to support its refusal to examine the basis for the arbitrators' decision, and its willingness to interpret the contract itself to find a ground to support the arbitrators' result, with its belief that "The Congressional policy of promoting arbitration requires that the courts do not intrude unnecessarily into questions that have been settled by an arbitration process agreed to by the parties, *lest the efficiency of the arbitration process be lost.*" Pet. App. at 5a (emphasis added). In holding that efficiency rather than scrupulous adherence to the parties' agreement is a reviewing court's primary concern, the Fifth Circuit went into direct conflict

with this Court's reading of Congress's purpose in enacting the Federal Arbitration Act.

Rejecting the very line of reasoning adopted by the Fifth Circuit, this Court has held that passage of the Arbitration Act "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and [the courts should not] . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (footnote omitted). The Fifth Circuit departed from this holding by closing its eyes to the fact that the arbitrators rewrote the contract rather than interpreting it as the parties intended, and then by trying to cover over for the arbitrators' error by substituting its own interpretation, when the parties had bargained that the arbitrators, and not the courts, would undertake that duty.

III. THE FIFTH CIRCUIT'S DECISION WILL HAVE SERIOUS ADVERSE EFFECTS UPON THE USE OF ARBITRATION BY CONTRACTING PARTIES.

A. *Arbitration less attractive.* The decision will reduce the attractiveness to contracting parties of agreeing to provide for arbitration. Tennessee, for example, has widely sought arbitration clauses in contracts for the purchase of natural gas. Because arbitrators are not judges and there is no judicial review of their interpretation of the contract, a fundamental assurance that parties such as Tennessee require before they will agree to provide for arbitration is that the arbitrators will limit themselves to applying the contract as the parties have written it. If arbitrators violate this premise and read the contract non-literally or otherwise touch upon issues not within their authority, the contracting parties need the assurance that courts are available to correct those missteps. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 232 (1987).

But the Fifth Circuit has withdrawn that assurance by holding that even if the arbitrators have given every sign of not regarding themselves as bound to follow the language of the contract, it as a reviewing court will ignore the arbitrators' statements.[9] This holding is extremely discouraging to anyone considering providing for arbitration in a contract. Certainly Tennessee would never have sought to provide for arbitration as a dispute-settling device in this or other gas contracts had it suspected that arbitrators could rewrite contract terms to deny Tennessee the pricing flexibility needed to meet competition in its markets—a flexibility for which it had explicitly bargained.

This Court underscored the importance of limiting arbitrators to the sphere the parties have agreed upon in *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986). The Court there noted that parties' willingness to provide for arbitration in contracts would be "drastically reduced" if the arbitrator, rather than the courts, had the power to determine the arbitrator's jurisdiction. The arbitrator "would be empowered 'to impose obligations outside the contract limited only by his understanding and conscience.'" *Id.* (citing A. Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1509 (1959)). The same considerations apply here.

B. *Judicial review more complex and costly.* The Fifth Circuit's decision will make judicial review of arbitration decisions more frequent, lengthier, more complex, and more costly, depriving both litigants and courts of another chief benefit of arbitration.

---

[9] There is no question that this holding will become well known to the bench and bar. Although the Fifth Circuit placed it in a footnote (Pet. App. at 8a), the West Publishing Company has (correctly) given the holding its own separate headnote. *See Anderman/Smith Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1216 (5th Cir. 1990).

Because the Fifth Circuit's approach allows and indeed requires reviewing courts to get into the merits of contract issues every time they review an arbitrator's decision, such litigation will become much more involved. Parties will brief and argue, without the benefit (or burden) of being able to refer to how the arbitrators actually reasoned, questions of whether the result reached by the arbitrators is or is not "rationally inferable" from the contract. Such *de novo* consideration of legal issues will be much more burdensome, time-consuming, and costly to both litigants and courts.

C. *Arbitrators will not explain decisions.* The decision will reduce—indeed, it will destroy—the incentive of arbitrators to explain the reasons for their decision. Because arbitrators have no obligation to prepare written explanations of their decisions, when they do explain them, it is obviously to assure the parties and the reviewing courts that the arbitrators have acted within the bounds of their authority. This tendency is clearly highly beneficial. A well-explained decision contributes to ending the controversy without further dispute or at least to facilitating judicial scrutiny.

But the Fifth Circuit's holding that courts must ignore any explanation given by the arbitrators will remove their incentive to explain the basis for their decision. The resulting barebones, result-only arbitration awards will encourage more frequent judicial review of arbitration decisions and in general be contrary to the policy of using arbitration to end disputes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
VINCENT F. EWELL, JR.
JOHN E. LEA
TENNESSEE GAS PIPELINE COMPANY
1010 Milam Street
P.O. Box 2511
Houston, Texas 77252
(713) 757-1246

ERNEST G. TAYLOR, JR.
KATHRYN H. HESTER
W. WHITAKER RAYNER
WATKINS LUDLAM & STENNIS
633 North State Street
P.O. Box 427
Jackson, Mississippi 39205
(601) 949-4900

DANIEL JOSEPH, P.C.*
COLLEEN M. COYLE
MARGARET J. BABB
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-1515

Summary Calendar

ANDERMAN/SMITH OPERATING CO.,
Plaintiff-Appellee,

v.

TENNESSEE GAS PIPELINE CO.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

Dec. 13, 1990

Ernest G. Taylor, Jr., Kathryn H. Hester, W. Whitaker Rayner, Watkins, Ludlam & Stennis, Jackson, Miss., Daniel Joseph, Randall L. Sarosdy, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for defendant-appellant.

Alan B. Cameron, Jack W. Brand, Kenneth Harmon, Gerald, Brand, Watters, Cox & Hembleben, Jackson, Miss., for plaintiff-appellee.

Before JOHNSON, SMITH, and WIENER, Circuit Judges.

JOHNSON, Circuit Judge:

Tennessee Gas Pipeline appeals from an order of the district court enforcing an arbitration award. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Anderman/Smith Operating Company ("Anderman") is a Colorado corporation which represents various sellers of natural gas produced from wells located in northwestern Alabama. Tennessee Gas Pipeline Company ("Tennessee") operates a pipeline service which purchases natural gas from various producers, including Anderman. In April 1982 Anderman and Tennessee entered into a Gas Sales and Purchase Agreement, which, among other things, determines the price that Tennessee pays for the gas it takes from Anderman and establishes various methods by which that price can be adjusted.

In early 1988 a dispute arose as to the price Tennessee was required to pay for Anderman's gas. The dispute prompted Anderman to file an action in federal district court; Tennessee responded by invoking an arbitration provision in the parties' agreement. Accordingly, the federal action was stayed, and the dispute was submitted to a panel of arbitrators.[1] After a hearing, the panel rendered a decision in favor of Anderman. Tennessee refused to comply with the arbitrators' award, and Anderman applied for an order confirming the award from the federal district court, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 9, 10. The district court confirmed the arbitrators' award, and Tennessee appeals.

---

[1] As provided by their agreement, each party named one member of the panel, and the court named the third. Tennessee named R. Clyde Hargrove as its arbitrator, Anderman/Smith named Robert K. Pezold, and the court appointed the Honorable James P. Coleman, a former Chief Judge of the Fifth Circuit, as the third member of the panel.

II. DISCUSSION

A. *The Dispute Before the Arbitrators*

Because the price of natural gas fluctuates, Tennessee and Anderman agreed to include in their contract various provisions allowing either or both of them to adjust the price of Anderman's gas over the life of the contract. The dispute before the arbitrators concerned the contractual provisions which establish the parties' respective rights to adjust the price. One of those provisions, § 10.4 of the contract, sets forth Tennessee's right to adjust the price by a procedure called "market out." Section 10.4 provides that when, in Tennessee's sole judgment, the price it is paying for Anderman's gas is too high to allow Tennessee to remain competitive in its end use markets, Tennessee may nominate a new price for the gas. To implement this provision, the contract provides that

> [Tennessee] shall give [Anderman] written notice . . . setting forth the cause and details of [Tennessee's] nomination of a new price and price computation method to be effective ninety (90) days after the date of [the] notice. During the first sixty (60) days following the date of [the notice], [Anderman] may solicit bona fide offers from other purchasers for the gas. . . .

Contract § 10.4. If Anderman receives better offers for its gas from another purchaser or purchasers, Tennessee must either match those offers or release Anderman's gas from the contract. If Anderman does not receive any better offers, then the price nominated by Tennessee becomes effective.

Another provision of the contract allows Anderman to initiate an adjustment of the price of the gas. That provision establishes a process called "price redetermination" which allows Anderman, no more frequently than once every three months, to change the method for calculating

the price for its gas. Anderman may choose either of two alternative methods, both of which are set out in the contract and are pegged to some market price for natural gas or fuel oil. Contract § 10.2.

The primary issue before the arbitration panel was to determine what the price of the gas should be. The panel was also presented, though, with important questions concerning the relative rights of the parties to adjust the price of gas in the future. Among others, these questions included:

1) whether Anderman must first invoke its right to a "price redetermination" before Tennessee can "market out,"

2) if Tennessee markets out, whether it can do so again if Anderman has not requested a price redetermination in the meantime, and

3) whether the price paid by Tennessee has to be uncompetitive for Tennessee's end-use markets before Tennessee can market out.

The arbitrators rendered a decision and fashioned remedies which resolved all of the issues before them. First, the panel set a price for the gas, and determined that that price should remain in effect for 12 months. Second, the arbitrators decided that any future price adjustments would have to be approved by the arbitration panel before becoming effective. Finally, the arbitrators decided that while Tennessee did not need to do so in its initial "market out" price adjustment, in any later request to "market out" Tennessee would first have to establish by a preponderance of the evidence that the existing price was too high to allow Tennessee to compete in its end use markets.

B. *Tennessee's Objections to the Arbitrators' Award*

Tennessee raises two principal objections to the award. First, Tennessee contends that the arbitrators ignored or deleted an express provision of the contract in deciding that before it could market out, Tennessee would have to demonstrate that the existing price was uncompetitive by a preponderance of the evidence. Second, Tennessee contends that the arbitrators' decision is invalid because it fashions a remedy—setting a price for a year, and requiring future price changes to be approved by the panel —which exceeds the arbitrators' authority. Neither of these arguments provides a sufficient basis for this Court to vacate the arbitrators' award.

The standard of review of an arbitration award is well settled. The federal courts will defer to the arbitrators' resolution of the dispute whenever possible. The Congressional policy of promoting arbitration requires that courts do not intrude unnecessarily into questions that have been settled by an arbitration process agreed to by the parties, lest the efficiency of the arbitration process be lost. Thus, "[j]udicial review of arbitration awards is extremely limited," *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Ben. Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989); "[j]udicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible." *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990).

The standard of review is thus a very deferential one. This Court must sustain arbitration awards even if it does not agree with the arbitrators' interpretation of the contract. The Supreme Court has held that as long as the arbitrator's decision "draws its essence" from the contract, the award must be confirmed. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987). *See also Delta Queen Steamboat Co.*, 889 F.2d at 602; *HMC Management Corp.*

v. Carpenters Dist. Council of New Orleans & Vicinity, 750 F.2d 1302, 1304.[2] To draw its essence from the contract,

> an [arbitrator's] award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the . . . agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract.

Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 264, 268 (5th Cir.) (quoting *Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co.*, 415 F.2d 403, 412 (5th Cir. 1969)), *cert. denied*, 469 U.S. 833, 105 S.Ct. 124, 83 L.Ed.2d 66 (1984). Keeping this highly deferential standard of review in mind, we turn to the objections to the arbitrators' award raised by Tennessee.

1. The Arbitrators' Construction of Tennessee's Right to "Market Out"

There can be no question that the arbitrators' decision in this case meets the minimal standard of review applicable to arbitration awards. The award is, in every respect, "rationally inferable" from the letter and purpose of the parties' contract.

The contract initially set a price between the parties, and provided that the price would be subject to adjustment from time to time, in order to account for changes in the market price of natural gas. The parties granted each other reciprocal rights to adjust the price of the gas. Tennessee maintains that its right to market out must

---

[2] This Court need not be so deferential to the district court's judgment. When a party challenges an arbitrator's award as exceeding the bounds of the underlying contract, as Tennessee does here, this Court will review *de novo* the district court's order confirming the arbitration award. *Delta Queen Steamboat Co.*, 889 F.2d at 602.

be read to be unlimited and absolute—exercisable in its "sole judgment."

The arbitrators disagreed. They read the contract to impose a requirement that Tennessee must demonstrate, by a preponderance of the evidence, that the existing price was so high that Tennessee could not remain competitive in its end use markets. Such a reading of the contract is certainly rationally inferable from the letter and purpose of the contract. As noted above, the contract requires that before Tennessee can market out it must give Anderman written notice of its intention to market out, and include with that notice a statement of the cause for marketing out, and the details of Tennessee's nomination of a new price. Contract § 10.4. The arbitrators' decision amounts to no more than a construction of the language of § 10.4 which requires Tennessee to demonstrate the truth of its statements about why it seeks to market out.

Moreover, the arbitrators decided that the interpretation of the contract offered by Tennessee would render the contract "over reaching and unenforceable." The arbitration panel clearly acted within the scope of its authority by reading the contract to avoid a result which would impute to the contract an unconscionable bargin.[3]

---

[3] Tennessee makes much of the language used by the arbitrators in reaching this conclusion. The arbitrators explained that "[w]e are unable to concur" in the portion of § 10.4 which allows Tennessee, in its sole judgment, to nominate a new price. Tennessee contends that the arbitrators' language indicates that they expressly deleted or ignored a provision of the contract, and that their award is therefore invalid.

Tennessee's argument fails for several reasons. First, it is clear that the arbitrators did not delete or ignore the provision of the contract that grants Tennessee the right to market out. Tennessee retains that right. While the arbitrators did construe the scope of Tennessee's right more narrowly than Tennessee would construe it—Tennessee argues that the contract grants it an unlimited right to market out in its "sole judgment"—the decision of the

In sum, the arbitration award is rationally inferable from the language and purpose of the contract, and therefore must be confirmed by this Court. Indeed, even if this Court would have interpreted the contract differently, the standard of review of arbitration awards requires it to defer to the arbitrators' interpretation of the contract. The parties bargained for an arbitration process which would determine facts and construe disputed contract provisions; there is no injustice in holding the parties to their bargain. *See Manville Forest Prod. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72, 74 (5th Cir. 1987). Indeed, Tennessee deliberately availed itself of the contract's arbitration provisions when it instituted the arbitration proceedings it now contests.

2. The Remedy Fashioned by the Arbitrators

Tennessee also objects to the remedy fashioned by the arbitrators—setting a price for one year, and requiring any future price changes to be approved by the arbitration panel. Tennessee argues that the arbitration panel had no authority to set a price for 12 months, because the contract gives Tennessee the right to market out whenever it wishes, and that the arbitrators had no basis on which to extend their authority to require that future price adjustments be brought before the panel. Neither of these arguments is well founded.

---

arbitrators that Tennessee's rights were not that broad is precisely the sort of issue of contract interpretation that an arbitration scheme is designed to resolve.

Second, this Court does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws its essence from the contract. This Court looks only to the result reached. The single question is whether the award, however arrived at, is rationally inferable from the contract. *See Local Union 59, Int'l Bhd. of Elec. Workers v. Green Corp.*, 725 F.2d 264, 268 (5th Cir.), *cert. denied*, 469 U.S. 833, 105 S.Ct. 124, 83 L.Ed.2d 66 (1984). Indeed, arbitrators are generally not even required to disclose or explain the reasons that underlie their decision. *See, e.g., Antwine*, 899 F.2d at 412.

Tennessee acknowledges that arbitrators have traditionally enjoyed broad leeway to fashion remedies. *See, e.g., Totem Marine Tug & Barge, Inc. v. North Am. Towing*, 607 F.2d 649, 651 (5th Cir. 1979). Here, the remedy chosen by the arbitration panel was entirely appropriate. If Tennessee's narrow interpretation of the arbitrators' powers were correct, any award rendered by the arbitrators would be virtually meaningless. No matter what the arbitration panel decided, under Tennessee's reading of the contract, either party would have the right to initiate a price adjustment immediately after the award was entered. Certainly the arbitration panel had authority to decide that for a limited period neither party would be able to change the price set by the arbitrators, in order to protect the integrity of the arbitration procedure established by the parties.

As to the portion of the arbitrators' award which requires that any future price adjustments must be approved by the arbitration panel, this Court finds no infirmity in the arbitrators' award. The arbitrators' resolution of the disputed contract terms requires Tennessee to demonstrate by a preponderance of the evidence that the existing price of the gas prevents Tennessee from competing in its end use markets. Plainly, such a resolution of the dispute between the parties requires that someone pass on whether Tennessee has met its burden. That someone is not specified in the contract. It was entirely proper, and in keeping with the flexible, informal nature of arbitration, for the arbitration panel to resolve this problem before it arose by establishing a forum which could determine whether Tennessee had established that it was entitled to market out. *See, e.g., Proodos Marine Carriers Co. v. Overseas Shipping & Logistics*, 578 F.Supp. 207, 212 (S.D.N.Y. 1984) (where a long term contract contains a broad arbitration clause, and disputes are submitted to and resolved by an arbitration panel selected in accordance with the contract, it is proper for that panel to remain in office to resolve later disputes

arising under the contract). There is no basis for this Court to invade the arbitrators' resolution of the dispute.[4]

III. CONCLUSION

The judgment of the district court is affirmed; the arbitrators' award is confirmed.

AFFIRMED.

---

[4] Tennessee's arguments that the arbitration panel has impermissibly extended its authority are without merit. First, Tennessee argues that since the contract provides that the arbitrators must render a decision within 60 days of the appointment of the third arbitrator, the arbitration panel has no authority to act after those 60 days. Tennessee confounds two separate aspects of the arbitrators' function: one is to resolve the parties' dispute within sixty days, and the other is to fashion an appropriate remedy. It is one thing to say that an arbitration panel which renders no decision within sixty days loses its authority to act; it is another thing altogether to say that the panel cannot impose any remedy which remains in effect for more than sixty days. Here it is clear that the panel acted within sixty days to resolve the dispute. That the remedy it imposed will continue for more than sixty days does not render the panel's decision—or the remedy—invalid.

Indeed, if Tennessee's position were correct, any decision of the arbitrators would expire after sixty days; the arbitrators' interpretation of a disputed contract provision, for instance, would have force only for sixty days, and after that period the dispute between the parties would re-arise. Such a position is plainly untenable.

Tennessee also argues that the arbitrators' continuing authority is barred by the doctrine of *functus officio*. That doctrine is designed to prevent an arbitrator from revisiting an award; it protects the finality of an arbitrator's decision. *See, e.g., Proodos Marine Carriers*, 578 F.Supp. at 211. The doctrine has no application here. The arbitration panel has not attempted, and there is no indication that it will attempt, to alter the decision it has rendered. It has retained authority solely for the limited purpose of passing on future price adjustments. Thus, although the price of gas under the contract may and probably will change, the arbitration panel's construction of the contract will not change. Accordingly, the evil to be avoided by the *functus officio* doctrine is not present here, and that doctrine is no barrier to the remedy adopted by the arbitrators.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J89-0166(W)

ANDERMAN/SMITH OPERATING COMPANY,
Plaintiff

v.

TENNESSEE GAS PIPELINE COMPANY,
Defendant

MEMORANDUM OPINION AND ORDER

[Filed May 30, 1990]

Before the court is the application of the plaintiff in the above styled and numbered cause seeking confirmation of an arbitration award. The defendant opposes confirmation and has moved to vacate the arbitration award on the grounds that the arbitrators either exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made, 9 U.S.C. 10(d).[1] Jurisdiction of this matter is based upon diversity, 28 U.S.C. § 1332.

The plaintiff is Anderman/Smith Operating Company (Anderman/Smith), a Colorado corporation who represents the sellers of natural gas produced by wells located in the Black Warrior Basin in northwestern Alabama

---

[1] Section 10(d), 9 U.S.C. provides in pertinent parts that "[W]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

pursuant to the gas contract submitted to arbitration in this case. The defendant is Tennessee Gas Pipeline Company (Tennessee), a Delaware corporation qualified to do business in Mississippi, who is the buyer of the plaintiff's natural gas and the operator of a pipeline service used to transport natural gas from the point of production to the defendant's end-use market.

THE ISSUES BEFORE THE ARBITRATOR

Arbitration proceedings began on July 18, 1989, before three arbitrators selected in accordance with the terms of the gas contract. The arbitration board consisted of one representative named by the defendant, one named by the plaintiff, and the Honorable J.P. Coleman who was named by Judge William H. Barbour as the neutral arbitrator. The following issues were submitted for resolution:

(1) the correct contract price for gas following a two-year suspension of the contract after April 1, 1989;

(2) whether buyer can name a new purchase price for gas under section 10.4 of the contract, a unilateral market-out price, in absence of the sellers first requesting a price redetermination under section 10.4 of the contract;

(3) does *price redetermination* only apply to the rights of the sellers; does *nomination of new price and price computation method* apply only to the buyer under the terms of the contract;

(4) if the buyer names a new price (markets out) once, can the buyer do so again before the sellers have asked for a price redetermination under section 10.2 of the contract;

(5) must the price paid by the buyer be uneconomic for buyer's "end-use" markets before the buyer

can market out under section 10.4 of the contract;

(6) if buyer has a unilateral right to market out, then must the price constitute the highest reasonable market value for gas which results in the price being uneconomical for buyer's end use market;

(7) what severance tax reimbursements, gathering charges or compression charges would the sellers be entitled to recover on gas refused after April 1, 1989.

THE DISPUTE

The parties entered into a gas sales and purchase agreement on April 1, 1982. The contract was amended several times, to include a settlement agreement in January of 1985 in regard to the price of deregulated natural gas. The price was set by the parties at $3.845 per MMBtu.[2] The natural gas market continued to decline, causing the parties to agree in 1986 to suspend the contract throughout 1987 and the first three months of 1988. During this period of suspension, Tennessee released the gas from its contractual claim, thereby permitting Anderman/Smith to sell its gas on the spot market. On April 1, 1989, the period of suspension came to an end, and Anderman/Smith asked Tennessee to perform or otherwise declare its intentions regarding the natural gas in question. Tennessee declared that it would pay $1.60 per MMBtu for gas from the date the contract went back into effect, an offer refused by Anderman/Smith. Thereafter, this matter was brought to arbitration. The task of the arbitrators was to reconcile sections 10.2 and 10.4 of the contract, the former permitting the sellers to request price redeterminations, and the latter permitting the buyer to nominate a new price

[2] MMBtu means one million British thermal units.

and price computation method.[3] Once a fair price was set, the arbitrators were then to determine what reimbursements Anderman/Smith should be paid for severance taxes, and what repayment should be made to Anderman/Smith for costs of gathering and transporting the gas.

THE ARBITRATION PROVISIONS OF THE CONTRACT

The gas contract provides for arbitration as follows:

> 10.2.2(c)—In the event Seller and Buyer are unable to agree upon a redetermined price under this paragraph (c) within a period of 60 days from the date of Seller's request, then the matter shall be determined by arbitration as set forth in Section 7-A of Exhibit "A" of the Contract.
>
> 10.2.3(b)—If Buyer and Seller are unable to mutually agree on a substitute publication, or an alternate price computation method as the case may be, such matter shall be determined by arbitration as

---

[3] 10.2.2—In the event Seller exercises its right provided in section 10.2.1, above, to request redetermination of the contract price for deregulated gas sold and delivered to Buyer hereunder, such request shall be made in writing to Buyer by no later than sixty (60) days prior to the beginning of the period for which such redetermined price is to be effective . . . such redetermined price shall become effective on the first day of deregulation . . . and shall remain in effect unless and until a subsequent price redetermination is made effective . . . Seller shall thereafter, at intervals not more frequent than once every quarter, have the right to request that the price . . . be redetermined in a like manner . . . .

10.4—In the event the price payable by Buyer to Seller for gas pursuant to this section 10., together with any additional payments, allowances or reimbursements payable under this Agreement and applicable to such gas, *in Buyer's sole judgment*, results or will result in gas being uncompetitive in Buyer's end-use markets, Buyer shall have the right to nominate a new price and price computation method for such gas which, *in Buyer's sole judgment*, will result in such gas being competitive in Buyer's said end-use markets;

provided in Section 7-A of Exhibit "A" of the Contract.

SECTION 7-A ARBITRATION:

7-A.1 *Any controversy arising between the parties with respect to any provision of this agreement* shall be determined by a board of arbitration . . .

7-A.2 The arbitrators shall be qualified by education, experience and training . . . . .

7-A.3 . . . shall promptly hear and determine . . . within 60 days after appointment of the third arbitrator . . . If within said period a decision is not rendered . . ., new arbitrators may be named . . .

7-A.4 *The decision of the arbitrators or a majority thereof made in writing shall be final and binding upon the parties hereto as to the questions submitted, and the parties will abide by and comply with such decision.* Each party shall bear the expenses of its arbitrator, and the expenses of the third arbitrator shall be borne equally by Buyer and Seller, except that each party shall bear the compensation and expense of its counsel, witnesses and employees.

The arbitrators determined that a fair price would be $2.13 per MMBtu. They determined that this price should remain in effect for a year. Any further disagreements were to be brought to this arbitration panel. Tennessee was directed to reimburse the severance taxes and pay the gathering and compression costs incurred by Anderman/Smith. Particularly pertinent to the matter before this court is the finding by the arbitrators that the "market-out" feature of the contract did not permit Tennessee to unilaterally determine that uneconomic circumstances justified a new purchase price without first substantiating its claim that such conditions existed.

After exercising the option under the contract terms, the arbitrators determined that any subsequent exercise of the market-out would require a showing of necessity by the preponderance of the evidence. The arbitrators found that the words *sole judgment* used in favor of the buyer, Tennessee, constituted overreaching and could not fairly be permitted to enable Tennessee to simply declare a new price any time it decided. The arbitrators also refused to accept Anderman/Smith's contention that the price should be locked in at $3.845 per MMBtu due to the failure of Tennessee to take or pay according to the original terms of the contract, and because Tennessee imposed its market-out without permitting Anderman/Smith to get a redetermination of price and pricing method.

The pertinent portion of the written determination states:

III

> The panel duly noted the "market out" and "price redetermination" rights *available to both parties* under the contract. We are unable to concur in that portion of Section 10.4 of the contract undertaking to allow buyer "in Buyer's sole judgment . . . to nominate a new price and price computation method which . . . will result in such gas being competitive in Buyer's end use markets." *We find that portion of Section 10.4 overreaching and unenforceable.* While the panel recognizes the importance of Buyer retaining its ability to compete in its end use markets as constituting an acceptable test of any currently effective or proposed contract price, the Panel concluded that Buyer should be required to establish the afore-described economic precondition by a preponder[a]nce of [t]he evidence in any later request to exercise its "market out" right.

IV

> Further price redetermination by either party may be requested only after expiration of twelve (12) months from the date of this order, and must be submitted to this Panel for determination of whether the price sought is in accordance with the contract hereunder consideration.

The opinion goes on to say that the arbitrators have attempted to provide seller a fair price while retaining the Buyer's ability to compete. The twelve-month provision was added to prevent the parties from having to arbitrate every 60 or 90 days. The arbitrators recognized that no dollar amount determined by them to be fair would be appropriate over a long period of time.

TENNESSEE'S OBJECTIONS TO THE ARBITRATORS' DETERMINATION

Tennessee has refused to abide by the arbitrators' decision and seeks to have this court vacate the arbitrators' determination, arguing that the arbitrators incorrectly construed the contract and exceeded their authority. The arbitration panel is accused of having stricken the market-out portion of the contract. The market-out clause in section 10.4 of the contract was, according to Tennessee, just for the buyer's benefit to protect against market declines. In exchange, Anderman/Smith got the right to seek "price redetermination" under section 10.2 to enable it to take advantage of market price increases. According to Tennessee, the contract automatically protects Anderman/Smith from arbitrary market-out prices. Under section 10.4 of the contract, Anderman/Smith is said to be entitled to seek other purchasers on the spot market if it does not accept the Tennessee price.

Tennessee argues that the arbitrators ignored the evidence presented in support of its market-out election. Exhibits "C", "D", "E", "F", and "G" to Tennessee's motion to vacate show contract and spot market prices

for natural gas from all over the United States. Tennessee argues that the arbitrators' decision ignored these exhibits and the exhibits of Anderman/Smith as well. The Anderman/Smith expert recommended only $1.73 per MMBtu plus severance and compression costs. Nevertheless, the arbitrators determined that a fair price should be $2.13 per MMBtu plus severance, compression and transportation costs.

Tennessee further argues that because the contract provides for dissolution of any panel of arbitrators after 60 days, it is improper and an abuse of power for the panel in this case to require that any future disputes be brought before this specific panel. Finally, Tennessee contends that the arbitration panel had no authority to impose their ruling for a twelve-month period or to require the parties to submit future disputes to the same panel for resolution.

THE RESPONSE OF ANDERMAN/SMITH

Anderman/Smith responds that the arbitrators had "broad leeway" in fashioning a remedy and that review of the arbitrators' decision is limited. The panel's decision to review any further disputes is characterized by Anderman/Smith as an attempt to avoid wasteful and unnecessary duplication of effort and expense in the future, a determination well within the power of the arbitration panel's broad grant of authority to fashion remedies. Moreover, the contract provision saying that the arbitration panel will be dissolved within 60 days applies when the panel has been unable to render a decision. Hence, says Anderman/Smith, there is no merit to the contention by Tennessee that the arbitrators exceeded their authority when they set the $2.13 per MMBtu price for twelve months. Anderman/Smith asks that the arbitrators' determination be confirmed and that the motion to vacate be denied.

APPLICABLE LAW

Judicial review of arbitration awards is severely limited. A court may not review the merits of an award. It must accept the facts found by the arbitrator and the arbitrator's interpretation of the contract. *Manville Forest Products v. United Paperworkers International Union*, 831 F.2d 72, 74 (5th Cir. 1987), and the authority therein cited.

Title 9 U.S.C. § 10 gives the grounds for vacating an arbitration award:

> (a) . . . corruption, fraud or undue means.
>
> (b) . . . evident partiality or corruption . . .
>
> (c) . . . misconduct by refusing to postpone a hearing or refusing to hear specific evidence . . .
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Tennessee relies only upon subsection (d) in this case to justify vacating the arbitrators' award.

Arbitrators enjoy a broad grant of authority to fashion remedies for those matters submitted for arbitration. Arbitrators are required to grant the parties a fundamentally fair hearing. Their authority is contractual, and arbitrators derive their authority from the scope of the contractual agreement. Arbitrators are to decide only those issues submitted. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979). An arbitrator can bind parties only on issues that they have agreed to submit to arbitration. Whether the arbitrator's bounds are exceeded is a question for the court, but the court's inquiry is limited. The arbitrator's decision is not reviewable on the merits. *International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Company*, 639 F.2d 279 (5th Cir. 1981).

Courts may not vacate arbitral awards except in rare instances—when arbitrators commit egregious error, make an irrational award or exceed specific contractual limitation on scope. *Ierna v. Arthur Murray International, Inc.*, 833 F.2d 1472 (11th Cir. 1987). In fact, courts are justified in exercising great caution when asked to set aside an arbitration award. *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838, 103 S.Ct. 84, 74 L.Ed.2d 79 (1982). Nevertheless, the award of an arbitration panel may be vacated where arbitrators exceed their powers, or go beyond the contract in question. 9 U.S.C. 10(d); *Totem Marine v. North American, supra.*

In *Totem Marine*, the court found that the arbitration panel had received ex parte evidence on the amount of the award to be given at a time after the hearing was over. It thereafter awarded three times what was being asked. Under these circumstances the award was vacated. The amount was not supportable with the evidence submitted, and the act of receiving ex parte evidence, especially after the arbitration proceeding was over, was clearly misconduct as well as being beyond the power of the arbitrator. The *Totem Marine* case serves as a good example of the circumstances under which an arbitration award should be vacated. *See also HMC Management Corp. v. Carpenters District Council*, 750 F.2d 1302 (5th Cir. 1985), where the arbitrator attempted to rectify a non-racial disparate treatment situation when the contract said nothing about requiring equal treatment under the circumstances in question. Clearly, the arbitrator went beyond the terms of the contract to fashion a remedy.

While an arbitrator may not go beyond the terms of the contract which creates his authority to fashion a remedy, the arbitrator is not bound to apply narrow constructions of the language found in the contract when determining an award. *Teamsters, Etc., Local Union*

657 v. Stanley Structures, Inc., 735 F.2d 903 (5th Cir. 1984), holds that an award should be enforced so long as it has a basis that is rationally inferable, if not obviously drawn, from the letter or the purpose of the (collective bargaining) agreement. There is no reason why this principle of the *Teamsters* decision should not be applied to any contract providing for arbitration. *Teamsters* also holds that an arbitrator must not disregard or modify the plain and unambiguous provisions of an agreement. The decision must have foundation in reason *or* fact. 735 F.2d at page 905.

DID THE ARBITRATORS EXCEED THEIR AUTHORITY?

Tennessee Gas argues that the arbitrators in this case have ignored the express terms of the contract or simply do not understand the agreement. It is obvious that the only basis for this argument is Tennessee's dissatisfaction with the decision. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960), is cited for the principle that an arbitrator is confined to interpretation and application of the (collective bargaining) agreement. The court is aware of this limitation upon the scope of the arbitrator's authority. However, the case also states that the question of interpretation of a contract is for the arbitrator. "It is his construction that was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 80 S.Ct. at page 1362.

St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood, 715 F.2d 405 (8th Cir. 1983), is cited as persuasive authority in support of finding that the arbitrators in the case *sub judice* ignored the plain and unambiguous language of the contract. The collective bargaining agreement in *St. Louis* said that an actor could

be fired for walking off stage. An actor walked off stage to see about an error in his paycheck and was fired. The arbitrator reinstated the actor saying that firing the actor was too severe, notwithstanding that the contract provided for this severe personnel action. On appeal, the decision was vacated for being in clear conflict with the terms of the collective bargaining agreement. The arbitrator in *St. Louis* chose to simply ignore a plain and unambiguous provision of the contract. The arbitrators in the case *sub judice* have not ignored the provisions of the contract in question and have obviously sought to resolve the ambiguity therein contained, a resolution well within their power as arbitrators. The *St. Louis* case is not persuasive in this instance.

Other cases cited by Tennessee which vacated the finding of the arbitrator deal exclusively with collective bargaining agreements and involve circumstances where the arbitrator ignored the contractual language in favor of finding a more equitable result. *Miller Brewing Co. v. Brewery Workers Local Union*, 739 F.2d 1159 (7th Cir. 1984); *Mistletoe Express Service v. Motor Expressman's Union*, 566 F.2d 692 (10th Cir. 1977); and *Pacific Motor Trucking Co. v. Automotive Machinists' Union*, 702 F.2d 176 (9th Cir. 1983). The Fifth Circuit case cited in support of the contention that the arbitrators in the case *sub judice* ignored the contract in question is *W.R. Grace v. Local Union No. 759*, 652 F.2d 1248 (5th Cir. 1982), affirmed, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). *W.R. Grace* holds, among other things, that incorrect determinations of a first arbitrator need not be followed by a second arbitrator. The agreement in question prohibited the arbitrator from adjusting, changing, or modifying any provision of the agreement. While Tennessee argues that this situation is similar to the case at bar, there is no reference whatsover to any clause in the contract which would prohibit the arbitrators in the case *sub judice* from making the determinations that they did.

Tennessee argues that the panel "struck down" the contractual provision that Tennessee could nominate a new price when in the *sole judgment* of Tennessee economic conditions necessitated. Tennessee uses the term "struck down" for impact in an effort to persuade the court that the arbitrators overstepped their authority by declaring a portion of the contract invalid. The only thing that might have been "struck down" was Tennesee's opinion of what the contract provides. In support of its contention that the arbitrators overstepped their authority, Tennessee relies only upon a 7th Circuit case which states that an arbitrator oversteps his authority when he makes his decision based on public policy. *Local No. P-1236 v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). The arbitrator in the *Jones* case found that a company rule which required employees to report unsanitary conditions to a supervisor was not in violation of public policy because public policy only demanded that such situations be rectified by those responsible for them. The contract did not address public policy. While the reviewing court did not agree with the arbitrator because the rule prevented an employee from contacting the USDA, the court found that the arbitrator's decision had to be vacated because it was not based upon any contractual considerations and turned instead upon the arbitrator's notion of what public policy required. This court is not persuaded by *Jones* since it has not been shown that the decision of the arbitrators in the case *sub judice* based their decision on any noncontractual notions or principles.

Presuming that the decision of the arbitrators contained ambiguity which permitted an inference that they overstepped their authority, this would still be no reason to vacate the award. *International Association of Machinists v. Texas Steel Co.*, 538 F.2d 1116, 1121 (5th Cir. 1976), cert. denied, 429 U.S. 1095, 97 S.Ct. 1110, 51 L.Ed.2d 542 (1977). This is because the decision need only draw its "essence" from the contract being inter-

preted. *United Steel of America v. Enterprise Wheel and Car, supra.* So long as the decision or award is rationally inferable in some logical way from the agreement (or contract) in question, it may be said that its essence has been drawn from the agreement (contract). This "essence" standard is to be interpreted broadly in favor of upholding the award. *International Chemical Workers Union v. Day & Zimmerman, Inc.*, 791 F.2d 366, 369 (5th Cir.), cert. denied, 107 S.Ct. 274 (1986); *Manville Forest Products v. United Paperworkers International, supra.*

There is nothing to show that the arbitrators in the case *sub judice* avoided or ignored the plain language of the contract when they developed what they believed to be a better, more equitable interpretation than what was being followed by the parties. The arbitrators reconciled the disputed portions of the contract. These portions of the contract were presented for resolution. The reviewing court may not overrule the decision because it believes its own interpretation might be a better one, even if the arbitrators' decision is ambiguous. *W.R. Grace v. Local Union 759, supra.*

REQUIRING FUTURE DISPUTES TO BE BROUGHT BEFORE THE SAME PANEL

Anderman/Smith calls this argument "hair-splitting." Tennessee is said to disregard all the cases saying that the arbitrator is granted broad authority to fashion a remedy by arguing that the arbitrators in question had no authority to require future disputes be submitted to them for further review. Anderman/Smith relies on the case of *International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Co.*, 639 F.2d 279 (5th Cir. 1981), which characterized a party's "exceeding the authority" argument as an attack on the intrinsic merits of the dispute rather than an attack upon the arbitrator's jurisdiction. The court went on to state that an arbitrator has broad discretion in fashioning a

remedy. Anderman/Smith cites authority supporting continuing review by the original arbitrator, referring to such an arrangement as the "normal course of action." *HMC Management Corp. v. Carpenters District Council, supra*, referring a matter back to the original arbitrator for clarification; *American Federation of State, County and Municipal Employees, Local No. 1803 v. Walker County Medical Center, Inc.*, 715 F.2d 1517 (11th Cir. 1983), holding that disputes over the meaning of an arbitrator's decision are properly referred to the arbitrator for resolution of any ambiguity; *San Antonio Newspaper Guild, Local No. 25 v. San Antonio Light Division*, 481 F.2d 821, 824-25 (5th Cir. 1973). Arbitration is not poker. Tennessee has shown no authority to substantiate its attempt to get a new deck of cards.

FREEZING THE PRICE AT $2.13 FOR 12 MONTHS

The *Totem Marine v. North America, supra*, case states that arbitrators have been granted broad authority to fashion remedies. It is difficult to believe that either of the parties contemplated a situation where their agreement would remain in constant arbitration and confusion. The object of the agreement was to sell gas and enrich the parties. The panel's determination that its decision would remain in effect for 12 months does nothing more than prevent the abuse of the agreement that was occurring. Furthermore, what the remedy should be is a matter for the arbitrator, not the court, to decide. *Local Union 59, I.B.E.W. v. Green Corporation*, 725 P.2d 264, 269 (5th Cir. 1984).

CONCLUSION

According to the langauge of the gas contract, where market prices make it impossible for the buyer to perform economically in its end-use markets, the buyer can give notice to the seller of its decision to nominate a new price and new price computation method effective ninety

(90) days after notice is given. This election is referred to as "marketing-out" which means that the buyer will look to what the market will bear as the justification for nominating a new price. The seller may, according to the language of the contact, ask for a price redetermination every quarter upon sixty (60) days notice. There is no limit on how often this could be done.

If a constant barrage of notifications began to occur, the situation would become chaotic. Arbitration might never cease. One of the arbitration questions placed before the arbitrators was whether a buyer exercising market-out according to the terms of the contract could do so again and again without the seller ever asking for a price redetermination. The arbitrators determined that these respective rights were interlocking, and that once Tennessee had exercised its market-out right, it should not be permitted to do so again without justifying the subsequent market-out at arbitration and proving the necessity by a preponderance of the evidence, especially where the seller had not sought a price redetermination. This court can find nothing to support an assertion that the remedy fashioned was either beyond the authority of the arbitrators or outside the terms of the contract.

IT IS, THEREFORE, ORDERED that the arbitration decision in the above styled and numbered cause is hereby confirmed and the motion to vacate the arbitrators award is hereby denied. The defendant, Tennessee Gas Pipeline Company, is hereby directed to comply with the terms of the arbitration award.

SO ORDERED, this the 30th day of May, 1990.

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

Civil Action No. J89-0166(W)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J89-0166(w)

ANDERMAN/SMITH OPERATING COMPANY,
Plaintiff

vs.

TENNESSEE GAS PIPELINE COMPANY,
Defendant

FINAL JUDGMENT

This matter came on pursuant to the application of the plaintiff in the above-styled and numbered cause seeking confirmation of an arbitration award, and this court, having determined that the arbitration award should be confirmed and that the motion of the defendant to vacate said award should be denied in a Memorandum Opinion and Order dated May 30, 1990, hereby directs that this cause shall be fully and finally dismissed.

SO ORDERED, this the 30th day of May, 1990.

/s/ Henry T. Wingate
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1515

ANDERMAN/SMITH OPERATING COMPANY,
Plaintiff-Appellee,

versus

TENNESSEE GAS PIPELINE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

[Filed January 17, 1991]

Before JOHNSON, SMITH and WIENER, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Proce-

dure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank Johnson
United States Circuit Judge
1-15-91

APPENDIX E

IN RE: ANDERMAN/SMITH OPERATING COMPANY

v.

TENNESSEE GAS PIPELING COMPANY

ARBITRATION AWARD

Before Coleman, Pezold and Hargrove, Arbitrators

I

This matter came on for hearing before the Arbitration Panel on July 18, 1989, at Jackson, Mississippi, and the hearings continued through July 21, 1989. The Panel orally rendered its decision and award on that date, after extensive discussion and consultation among the arbitrators. The award hereinafter set forth is rendered strictly on the basis of the record adduced before the Panel in this proceeding.

II

The Panel determines that from and after April 1, 1989, the appropriate price to be paid by Tennessee Gas Pipeline Company (TGP) to Anderman/Smith Operating Company, et al. (Anderman) is $2.13 per Mcf at the point of delivery specified in the contract [Section 7].

Additionally, Tennessee Gas Pipeline is obligated to bear all cost of transportation from the point of delivery to the TGP pipeline [Sections 7 and 8, as amended].

Finally, TGP shall reimburse Anderman for all federal and state production, gathering, severance or similar taxes levied on the gas sold by Anderman to TGP [Section 11 of the contract, subject to the provisions therein set forth].

III

The Panel duly noted the "market out" and "price redetermination" rights available to both parties under the contract. We are unable to concur in that portion of Section 10.4 of the contract undertaking to allow Buyer "in Buyer's sole judgment . . . to nominate a new price and price computation method which . . . will result in such gas being competitive in Buyer's said end use markets." We find that portion of Section 10.4 over reaching and unenforceable. While the Panel recognizes the importance of Buyer retaining its ability to compete in its end use markets as constituting an acceptable test of any currently effective or proposed contract price, the Panel concluded that Buyer should be required to establish the afore-described economic precondition by a preponderence [sic] of the evidence in any later request to exercise its "market out" right.

IV

Further price redeterminations by either party may be requested only after the expiration of twelve (12) months from the date of this Order, and must be submitted to this Panel for determination of whether the price sought is in accordance with the contract hereunder consideration.

The Panel finds Anderman to be in the position of the prevailing party in this arbitration.

On the record here, the Panel undertook by this award to provide a fair price to the Seller, while retaining Buyer's ability to compete in Buyer's end use markets. It is probable that this result will remain effective for only a limited portion of the remaining term of the contract, which is as it should be. If the objective is to provide market sensitive pricing to protect the economic interests of both parties, no single dollar and cent price is likely to remain appropriate over a long period of time.

So Agreed and Ordered in a session of the Panel held in Memphis, Tennessee, on August 22, 1989.

/s/ Jas. P. Coleman
HONORABLE JAMES P. COLEMAN
115 East Quinn Avenue
P. O. Box K
Ackerman, Mississippi 39735

/s/ Robert K. Pezold
ROBERT K. PEZOLD, ESQUIRE
BRUNE, PEZOLD, RICHEY & LEWIS
700 Sinclair Building
Six East Fifth Street
Tulsa, Oklahoma 74103

/s/ R. Clyde Hargrove
R. CLYDE HARGROVE, ESQUIRE
333 Texas, Suite 1217
Shreveport, Louisiana 71101-3677

APPENDIX F

UNITED STATES CODE

Volume Two, Title 9—Arbitration

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service

shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.